(3)

No. 06-994

IN THE

Supreme Court of the United States

ANTHONY CICCONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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I. This Court Should Resolve the Dispute Whether Union Free Speech and Democratic Rights Are Obtainable Property Under the Hobbs Act and Under This Court's Decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003).

A. This Court Previously Granted Certiorari On the Property Issue Without Resolving It, and Should Return to Address It Here.

There is no dispute that this Court previously deemed the issue of the nature of "property" under the Hobbs Act to be worthy of intervention even if in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003) the Court ultimately decided the case on the "obtaining" issue instead. *See* Pet. 13. Respondent's arguments for why the issue should not be broached now, however, lack merit.[1]

Respondent does not dispute petitioner's citation to a split in the lower federal courts whether union democratic and free speech rights constitute property under federal criminal statutes. Respondent contends, however, (Resp. 8-9, 10-11) that the split may be disregarded because the cases cited by petitioner fall under the mail and wire fraud statutes. These cases, respondent argues, ought to be ignored because in *McNally v. United States*, 483 U.S. 350 (1987) this Court suggested that one of its reasons for limiting the mail and wire fraud statutes to schemes to deprive a victim of "property" was to avoid having the federal government involved in setting standards of behavior for state and local

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1. Respondent invokes the non-issue that *Scheidler* does not preclude application of the Hobbs Act to intangible property rights. Resp. 9. This is not and never has been the issue in this case. The property issue is whether rights to union democracy and free speech constitute "property" under the Hobbs Act. The other issue, *see* Section B, *infra*, is whether any such rights can be obtained within the meaning of the Hobbs Act.

officials, and that there is no such risk in respect to rights to union free speech and democracy. Resp. 11.

Together with the rule of lenity, the reference to federalism in *McNally* formed the Court's secondary reason for requiring a clearer statement from Congress that non-property interests (in that case, rights to honest services) would be covered under the mail and wire fraud statutes. *See* 483 U.S. at 359-60. Prior to invoking federalism, this Court considered the legal and legislative background and concluded that, while the statutes were silent on a property requirement, Congress should be deemed to have intended the prohibition on fraud to be limited to schemes directed at property. 483 U.S. at 356-59. The situation with the Hobbs Act was far different. As this Court explained in *Scheidler*, at the time of enactment, Congress was fully aware of the requirements in existing law and chose its words carefully. 537 U.S. at 406-07. Unlike with the mail and wire fraud statutes where the property requirement was not explicit and had to be read in by this Court, 483 U.S. at 358-59, the Hobbs Act contained an explicit property requirement in the statute. 537 U.S. at 407-08; 18 U.S.C. § 1951(b)(2). Thus, if anything the property requirement should be deemed more central and exacting in the case of the Hobbs Act.

Moreover, as this Court detailed in *Scheidler*, Congress was well aware of the distinction between extortion of property and coercion when enacting the Hobbs Act and deliberately chose to exclude coercion from the Act's coverage. *See* 537 U.S. at 407-08. As argued further below, the government's effort to read union democratic and free speech rights into the statute is for all intents and purposes an effort to read coercion (without any necessary deprivation of property) back into the statute. Thus, it is not enough to suggest that the Hobbs Act is about "labor" and therefore anything remotely smacking of labor impropriety ought to be deemed a violation. Were this the case, Congress, being

very careful in enacting the Hobbs Act would not have made such a point of requiring a property deprivation and excluding coercion, which would easily have lent itself to coverage of a spectrum of labor practices.[2]

Respondent further contends that the Hobbs Act was passed to address extortion in the labor context, and that labor free speech and democratic rights "are more akin to the intangible rights held protected as property in *Carpenter* [*v. United States*, 484 U.S. 19 (1987)] than the rights held not to be property in *McNally*." Resp. 11. Respectfully, the comparison is inapt. The rights in the post-*McNally* cases cited by petitioner that are rejected as not constituting property *are* union democratic and labor rights such as are at issue in this case. *See* Pet. 17-18 (citing *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989)(en banc); *United States v. Zauber*, 857 F.2d 137, 143-44 (3d Cir. 1988); *United States v. Lombardo*, 865 F.2d 155, 158-59 (7th Cir. 1989)). In contrast, *Carpenter* concerned a scheme to trade in the stock markets on the advantage of illegally procured confidential business information. Unlike labor democratic rights, as this Court explained in *Carpenter*, "[c]onfidential business information has long been recognized as property." 484 U.S. at 26 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984); *Dirks v. SEC*, 463 U.S. 646, 653 n.10 (1983); *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-251 (1905)). *Carpenter* furnishes no basis whatsoever for deeming union democratic and free speech rights "property."

Respondent nowhere explains why "property" should include something seemingly as foreign as rights to free

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2. Congress, while excluding coercion from the criminal sanctions in the Hobbs Act, has prohibited coercive tactics as an unfair labor practice. 29 U.S.C. § 158(b). This is further indication that it knows when and how to address the issue without creative assistance from representatives of other branches.

speech and union democratic rights. It is not enough to suggest that such rights relate in some indirect sense to the worker's wage, because seemingly any right can be so linked. Any journalist, for example, can link free speech rights to the bottom line. The issue is not whether the right could relate to property but whether it is property. Respondent's position would obliterate any meaningful distinction between liberty and property and would presumably pave the way for increased regulation of liberty interests such as free speech where there is some argument that such rights are connected in some way to property.

Respondent declines to address the court of appeals' remarkable conclusion that "the appropriate interpretation of *Scheidler II* must be one that co-exists with [*United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969)]. . . ." App. 52a (emphasis added). Not only did this Court explicitly deem it "mistaken to suggest that our decision *reaches*, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)," 537 U.S. at 402 n.6 (emphasis added), but as set forth in the petition (Pet. 14-15), *Tropiano*'s consciously "expansive" interpretation of the Hobbs Act is decidedly at odds with *Scheidler*'s holding that *strict* construction in the form of the rule of lenity is mandated in construing the Hobbs Act. *See* 537 U.S. at 408-09. Moreover, *Tropiano*'s conception that "[t]he right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution," 418 F.2d at 1076, conflicts with the holding of this Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) that "business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense . . ." 527 U.S. at 675. Respondent's complaint that *College Savings Bank* is not a Hobbs Act case

(Resp. 12) is both correct and beside the point that this Court should intervene to clarify whether *College Savings Bank* or *Tropiano* represents the proper conception of property under the Hobbs Act.

B. The Decision Below Conflicts With *Scheidler's* Holding that Mere Coercion or Regulation of Property Does Not Constitute an Obtaining of that Property.

Respondent contends that the decision below comports with *Scheidler's* requirement that obtaining property be the object of a charged extortion under the Hobbs Act. Resp. 12-13. But respondent nowhere even attempts to explain how petitioner with respect to union free speech and democratic rights, "pursued []or received something of value . . . that [he] could *exercise, transfer, or sell.*" *Scheidler*, 537 U.S. at 405 (emphasis added). There is no evidence that petitioner, who was not even in the union at the time, exercised, transferred or sold rights to union democracy and free speech held by any individual union member. At most, evidence showed that he sought to coerce a particular choice among those rights, just as the defendants in *Scheidler* sought to coerce a particular choice among abortion and other rights without actually exercising them. This did not constitute obtaining property under *Scheidler.*

Respondent's only attempt to distinguish *Scheidler* is to point to the "overlap" of coercion and extortion that is referenced in *Scheidler.* Resp. 13 (citing 537 U.S. at 407-08). But this Court was merely making the point that since all extortion (*i.e.* obtaining of property) will necessarily involve coercion, it was most significant that Congress chose to exclude acts of coercion alone (*i.e.* without obtaining property) from the purview of the Hobbs Act. *See id.* This supports petitioner's rather than respondent's position, because this is precisely the kind of case that involves coercion alone. As this Court stated in words squarely

applicable here, "[t]he crime of coercion . . . involves the use of force or threat of force to restrict another's freedom of action." 537 U.S. at 405. Any conceivable doubt is removed by the New York State examples of coercion but not extortion that this Court cited, and which are clearly of a piece with this case. *See Scheidler*, 537 U.S. at 405-06 (citing examples of coercion of a business to join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances).

In a telling omission, respondent nowhere addresses *Scheidler*'s overturning of *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), the case upon which the trial theory was premised, and which had deemed it sufficient under the Hobbs Act to "frustrate" or "regulate the fate" of property rights rather than actually obtain them. That the court that authored *Arena* would in this case fail to recognize a theory that is equally invalid under *Scheidler* indicates that the message of *Scheidler* has not been received, and for this and the other reasons stated above, this Court should intervene.

II. The Conclusion of the Court of Appeals that Hobbs Act Extortion Can Be Founded On Unexplained, "Suspicious" Payments Dangerously Expands the Offense and Shifts the Burden of Proof.

The court of appeals' overbroad conception of obtaining property combines with unconstitutionally minimalist and burden-shifting requirements for proof of extortion, and together present a dangerous Hobbs Act that potentially applies to all manner of conduct at the discretion of prosecutors and unfettered by any meaningful standards enacted by Congress. While respondent would treat the court of appeals' wholly dangerous holding regarding the Carmine Ragucci extortion counts as quibbling over evidentiary facts, by statement and implication respondent actually underscores

the reasons why this Court should intervene on this in addition to the other Hobbs Act issues presented.

Respondent nowhere denies the two conflicts with other courts of appeal that are presented here, and its arguments against intervention actually demonstrate why intervention is appropriate. Respondent does not dispute petitioner's contention that reliance in the decision below on defendant's failure to affirmatively demonstrate any "legitimate" reason for the payments in question conflicts with the Eleventh Circuit's decision in *United States v. Fernandez*, 892 F.2d 976, 986 n.9 (11th Cir. 1990) holding that such a line of reasoning on sufficiency review improperly shifts the burden of proof to defendant. Indeed, respondent's denial that the burden of proof was shifted to defendant actually confirms petitioner's point. Respondent, like the court below, is unable to muster the "ample" proof without relying on petitioner's failure to come forward with proof of "any legitimate purpose for the payments." (Resp. 15). Even the configuration that "nothing in the record dispelled the rational inference that the payments were the product of fear, *rather than any legitimate reason*" (Resp. 15) (emphasis added) is unable to avoid the inherent burden shifting also seen in the analysis below. Petitioner, after all, was the only party to this case with any conceivable interest in demonstrating a "legitimate reason" for the payments, so there can be no denying that reliance on the absence of proof of legitimacy necessarily faults petitioner for failing to shoulder a burden inappropriately placed upon him.

Nor does respondent dispute the conflict between the decision below and that of multiple decisions of various courts of appeals that the mere conclusion that "something" illegal was happening without actual proof of the specific crime charged is insufficient to constitute proof beyond a reasonable doubt. *See* Pet. 24-25. Again, respondent helps to demonstrate petitioner's point that the court of appeals'

decision transmogrifies "extortion" under the Hobbs Act into a federal, unexplained and suspicious money transfer statute. While nowhere disputing that there was no evidence of the purpose of the payments in question or that the payer was placed in any fear whatsoever, respondent cites "ample record evidence" of an extortion from surreptitious cash payments, displeasure when they were late, the absence of proof of a "legitimate purpose" and the subjective opinion of one witness (who disclaimed actual knowledge of the purpose of the payments) that some unidentified thing was "not . . . proper." Resp. 15. Such generic facts emcompass a broad spectrum of potential behavior ranging from legal, to suspicious to illegal, but not one that could conceivably and reasonably be characterized as extortion as Congress has defined it beyond a reasonable doubt. Congress has not enacted a federal suspicious payment statute, and this Court ought to be concerned that one has been created out of the Hobbs Act in this case.

III. The Court of Appeals Applied a Standard Rejected By this Court to the Interstate Commerce Element of the Money Laundering Counts.

The court of appeals has concluded decisively that with respect to establishing an interstate commerce effect on money laundering counts "it is indeed permissible to consider the conduct that gave rise to the laundered funds." App. 81a-82a. While this Court's decision in *United States v. Cabrales*, 524 U.S. 1, 7 (1998) concerns venue as respondent correctly notes (Resp. 16-17), *Cabrales*' holding that the money laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds allegedly laundered" is squarely inconsistent with the court of appeals' conclusion in this case. Under the statute it is those transactions and not the underlying activity that must affect interstate commerce. *See* 18 U.S.C. § 1956(c)(4). Respondent's citation to its argument as a party in the

Cabrales case that the underlying offense "might be said . . . [to be] an essential element" of the subsequent laundering (Resp. 17; citing 524 U.S. at 7-8) did not persuade this Court to lay venue based on the underlying conduct in that case, nor should that failed argument apply to the interstate commerce clause nexus. In the end the Court is presented with a decision below, as contrasted with other circuits, (Pet. 28), that would disregard the teaching of *Cabrales*.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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